Supreme Court, U.S.
FILED
FEB 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-951

In the Supreme Court of the United States

OCTOBER TERM, 1985

THOMAS D. ROBINSON, ET AL., PETITIONERS

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly affirmed the decision of the Merit Systems Protection Board sustaining petitioners' removal for participating in a strike against the United States and for being absent without leave.

2. Whether the court of appeals abused its discretion in assessing $500 against petitioners' counsel under Fed. R. App. P. 38.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-5a) is reported at 769 F.2d 1556. The opinion of the Merit Systems Protection Board (Pet. App. 6a-9a) is reported at 16 M.S.P.R. 264; the opinion of the Board's presiding official (Pet. App. 10a-40a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1985. Petitioners' petition for rehearing was denied on September 9, 1985 (Pet. App. 1a). The petition for a writ of certiorari was filed on December 3, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners challenge their removal from federal employment following the air traffic controllers' strike in 1981. The background of the strike and the subsequent litigation are set forth in our Brief in Opposition in *Campbell* v. *Department of Transportation, FAA*, No. 84-78, in response to one of a number of other petitions arising out of the strike.[1]

1. Petitioners were removed from their positions as air traffic controllers on the grounds that they participated in a strike against the United States and were absent without leave during the strike. They appealed to the Merit Systems Protection Board (MSPB or Board), where they were afforded a hearing. The agency established a prima facie case of strike participation by demonstrating that petitioners were absent without leave during a strike of general knowledge.[2] At no time did petitioners claim that they reported to work on the days charged or that their absences were authorized. The presiding official re-

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[1] A copy of our response in *Campbell* has been sent to counsel for petitioners.

[2] The standard applied requires that the agency at all times bear the burden of persuasion with respect to strike participation; the agency must show by a preponderance of the evidence that the employee withheld his services in concert with others. *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477, 482-483 (Fed. Cir.), cert. denied, No. 84-258 (Nov. 13, 1984). Once the agency has made a prima facie showing by evidence of the employee's unauthorized and unexplained absence during a strike of general knowledge, "the burden of going forward with evidence to rebut that showing necessarily shifts to the employee, who is in the best position to present explanatory evidence to counter that showing." 735 F.2d at 482. See Pet. App. 3a.

viewed petitioners' myriad claims in some detail (Pet. App. 10a-40a) and rejected them. He found that the agency had proved the charges against petitioners of strike participation and absence without leave by a preponderance of the evidence, and that removal was an appropriate penalty. The full Board denied petitioners' petition for review, also discussing and rejecting petitioners' numerous contentions (*id.* at 6a-9a).

Petitioners then sought review in the United States Court of Appeals for the Federal Circuit. Their petition was among approximately 3,500 similar petitions filed by discharged air traffic controllers. All but nine cases were stayed pending the court's decisions in those "lead cases." On May 18, 1984, a five-judge panel of the court of appeals issued 11 decisions sustaining the removals of all but one of the petitioners in the lead cases.

A number of the unsuccessful petitioners filed petitions for a writ of certiorari; all were denied. See, *e.g.*, *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477 (Fed. Cir.), cert. denied, No. 84-258 (Nov. 13, 1984); *Anderson* v. *Department of Transportation, FAA*, 735 F.2d 537 (Fed. Cir.), cert. denied, No. 84-259 (Nov. 13, 1984); *Campbell* v. *Department of Transportation, FAA*, 735 F.2d 497 (Fed. Cir.), cert. denied, No. 84-78 (Oct. 9, 1984). After this Court denied the petitions in the lead cases, the court of appeals lifted the stay of the other pending appeals.

2. In one of the first decisions issued by the court of appeals after the stay was lifted, the court affirmed the decision of the Board in petitioners' case (Pet. App. 2a-5a). The court noted (*id.* at 3a) that "[c]ounsel bases this entire appeal on an unfounded attack on the government," and that the challenge to

the Board's decision amounted to an "indiscriminate 'blast of procedural objections' substantially identical to that condemned in *DiMasso v. Department of Transportation, FAA*, 735 F.2d 526, 527 n.3, 528 (Fed. Cir.), *cert. denied*, [No. 84-258 (Nov. 13, 1984)], an authority blithely disregarded by counsel." The court "carefully reviewed petitioners' arguments and the record 'on the possibility that a non-frivolous contention might have been found lurking' " but concluded that "[t]his appeal is clearly frivolous" (Pet. App. 4a-5a (citations omitted)). The court found that the Board's decision was not arbitrary or capricious, procedurally unsound, or unsupported by substantial evidence (*id.* at 5a; see 5 U.S.C. 7703(c)), and assessed $500 against petitioners' counsel under Fed. R. App. P. 38 (Pet. App. 5a).

ARGUMENT

Petitioners raise only frivolous procedural objections to their discharges, and do not dispute that they were not at work during the strike and that their absence was unauthorized. The $500 assessment against their counsel was also amply justified. The decision of the court of appeals in this factbound dispute is therefore correct and does not merit further review.

1. Petitioners' challenge to the merits of the decision of the court of appeals is clearly unavailing. Their principal claim on appeal was that they had been denied due process by the agency's failure to produce a witness, by its erroneous initial statement that another witness petitioners sought to depose had no relevant information, by the presiding official's failure to impose sanctions on the agency, by his allowance of the second witness's testimony, and by his general

bias in favor of the agency (Pet. App. 3a-4a, 55a-56a). It is unclear whether this claim is included in the petition. In any event, for the reasons given by the court of appeals (*id.* at 3a-4a), the claim is patently without merit.

Petitioners' remaining contentions on appeal—which are renewed in their petition for a writ of certiorari—were properly rejected on the basis of the Board opinion (Pet. App. 5a; see 5 U.S.C. 7703(c)). We shall discuss them briefly here.

a. Petitioners' contention (Pet. 19-20) that the agency official who removed petitioners acted without authority was rejected by the Board because the agency directive upon which petitioners relied had been superseded and because unrebutted testimony established that the authority to remove petitioners had been delegated to the agency official (Pet. App. 7a). Petitioners have not demonstrated any error in this holding.[3]

b. Petitioners' contention (Pet. 20-23) that the agency failed to give them proper notice of the proposal to remove them is essentially a challenge to the harmful error rule applied by the court of appeals in the lead air traffic controller case of *Adams* v. *Department of Transportation, FAA*, 735 F.2d 488, 490 n.3 (Fed. Cir.), cert. denied, No. 84-258 (Nov. 13, 1984). See also Pet. App. 15a-16a; *Handy* v. *United States Postal Service*, 754 F.2d 335 (Fed. Cir. 1985). The presiding official found that petitioners all had "an opportunity to reply and took advantage of it" and that "[n]one has come forward with any evidence that they would have submitted an additional

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[3] Petitioners' contention (Pet. 19-20) that there was no strike at the time in question is answered at pages 6-7, *infra*.

reply by the date of decision, and none has demonstrated how the agency's error harmed them or caused the agency to come to a decision different from the one that it did" (Pet. App. 19a). Petitioners suggest no reason why this Court should review the harmless error standard after declining to do so in *Adams*, nor do they suggest why the error was not harmless.

c. Petitioners' contention (Pet. 23-25) that there was no air traffic controller strike at the time they were charged with strike participation was properly rejected based on the opinions of the Board (see Pet. App. 5a, 8a-9a n.2, 28a-29a).[4] Petitioners appealed this question notwithstanding the court of appeals' prior decision in *Adams* v. *Department of Transportation, FAA*, *supra*, that the strike began on August 3, 1981, that it continued until some event ended it,[5] and that the statements of government officials upon which petitioners rely did not end the strike. 735 F.2d at 493-494. Petitioners' attempt to

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[4] The presiding official quite reasonably granted the agency's request that he take official notice that a nationwide strike by air traffic controllers began on August 3, 1981, and continued through at least August 6, 1981, a time period that encompassed the dates on which petitioners were charged with strike participation. In doing so, the presiding official followed a prior decision of the full Board to the same effect (*Ketchem* v. *Department of Transportation, FAA*, 12 M.S.P.R. 1, 7 (1982)). The presiding official then rejected the claim that statements by government officials on or prior to August 5 somehow ended the strike, concluding that petitioners were still required to return to work after that date. Pet. App. 28a-29a. The fact that petitioners continued to withhold their services itself evidenced a continuation of the strike.

[5] In *Adams*, the court of appeals concluded that there was no evidence that the union took any steps to end the strike before August 12, 1981. 735 F.2d at 493.

rehash the issues decided in *Adams* does not merit this Court's review.

d. Petitioners Kapp and Robinson's contention (Pet. 25-26) that their discharges should be cancelled because they were removed for reasons other than those stated in the notices of proposed removal is also frivolous. The only errors in the notices for those individuals were de minimis discrepancies in the time of the shift to which they failed to report on August 6 (Pet. App. 36a).[6] The presiding official properly found that no harm resulted from this error; neither individual alleged that he attempted to report for work at any time on that day (*ibid.*). In *Campbell* v. *Department of Transportation, FAA*, 735 F.2d 497, 502 (Fed. Cir.), cert. denied, No. 84-78 (Oct. 9, 1984), the court of appeals specifically rejected the sort of argument petitioners Kapp and Robinson continue to pursue here.

e. Petitioners Kitts and Neal's contention (Pet. 26) that their discharges should be cancelled because they did not receive notice of the agency's decision to remove them on or before the effective date of the removal is meritless. While 5 C.F.R. 752.404(f) does require notice on or before the effective date of a removal, there has been no demonstration of harm in this case. The only potential harm would be an untimely appeal to the Board, but in this case both petitioners filed timely appeals. As the Board said,

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[6] Petitioner Kapp was charged with being AWOL from the 3:12 p.m. shift on August 6, 1981, when the shift to which he failed to report actually began 24 minutes earlier, at 2:48 p.m. Petitioner Robinson was charged with being AWOL from the 3:00 p.m. shift on August 6, when his shift on that date was actually scheduled to begin at 2:48 p.m., 12 minutes earlier. Pet. App. 36a.

"[A]ll of the [petitioners] * * * timely filed appeals with the Board. Thus, the presiding official correctly found that [petitioners] failed to establish that these alleged procedural errors were harmful" (Pet. App. 7a-8a; see *id.* at 36a). Absent a demonstration of harm, petitioners' late receipt of the notices of removal cannot justify cancellation of their removals.

f. Petitioners' contention (Pet. 27-28) that the Board applied an improper rule of evidence is, in fact, a repetition of their contention to the court below that the Board's presiding official was biased. The court of appeals found this argument to be "[w]ithout the slightest justification," "utterly meritless raillery," and "offensive" (Pet. App. 4a). Nothing in petitioners' present petition demonstrates that this finding should be reviewed by this Court.[7]

2. The court of appeals was also entirely justified under Fed. R. App. P. 38 in assessing $500 against petitioners' counsel (Pet. App. 5a).[8] As the foregoing discussion demonstrates, the court of appeals had ample reason to conclude that petitioners' appeal was "clearly frivolous"—that petitioner's arguments lacked "the slightest justification"; were "utterly meritless raillery" and "offensive"; had "waste[d]

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[7] Petitioners' specific claims (Pet. 27-28) of sickness were correctly discarded by the presiding official (see Pet. App. 24a, 32a, 35a) and do not merit further review.

[8] Rule 38 provides:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

This Court's similar rule is Rule 49.2, which states:

> When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages.

the resources" of the court and opposing counsel; and had been "destructive to the equitable and efficient administration of justice [by] * * * delay[ing] deserving litigants in obtaining their statutory and constitutional right to judicial review" (*id.* at 4a-5a). Petitioners, however, also challenge the award on the grounds (Pet. 10) that they had no notice or opportunity for a hearing; that Rule 38 does not authorize an award against counsel; that the court of appeals did not adequately explain why the $500 sum levied was "just"; and that there could be no award absent a finding that counsel had acted in bad faith. These contentions are insubstantial.

a. There can be no credible claim in this case that petitioners' counsel was without notice of the court's intention to exercise its Rule 38 powers. He must have been aware of Rule 38. Moreover, the Federal Circuit had published numerous decisions assessing costs and damages upon the filing of frivolous appeals.[9] Indeed, the court of appeals sent all counsel in the air traffic controller appeals, including petitioners' counsel, two separate notices—on May 18, 1984, and December 10, 1984—advising them of the impropriety of maintaining frivolous appeals and citing the court's precedents (listed in the preceding

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[9] See *Wright* v. *United States*, 728 F.2d 1459, 1460 (Fed. Cir. 1984), cert. denied, No. 83-6869 (Oct. 1, 1984); *Beachboard* v. *United States*, 727 F.2d 1092, 1094-1095 (Fed. Cir. 1984); *Connell* v. *Sears, Roebuck & Co.*, 722 F.2d 1542, 1553-1555 (Fed. Cir. 1983); *Asberry* v. *United States Postal Service*, 692 F.2d 1378, 1382 (Fed. Cir. 1982). Decisions by other courts of appeals making similar awards are collected in Annot., *Award of Damages or Costs Under 28 USCS § 1912 or Rule 38 of Federal Rules of Appellate Procedure, Against Appellant Who Brings Frivolous Appeals*, 67 A.L.R. Fed. 319 (1984 & Supp. 1985).

footnote) on the subject. See also *Adams* v. *Department of Transportation, FAA*, 735 F.2d at 494; *Moylan* v. *Department of Transportation, FAA*, 735 F.2d 524, 524 n.* (Fed. Cir.), cert. denied, No. 84-258 (Nov. 13, 1984). Petitioners and their counsel clearly had ample notice of the court's intention to assess costs and damages against them if they pursued frivolous appeals.

Petitioners' claim that they were entitled to a hearing is curious, because they do not explain what purpose a hearing would have served. See *Codd* v. *Velger*, 429 U.S. 624, 627 (1977). "After thorough review of the record, briefs, and submissions" (Pet. App. 3a), and after hearing oral argument, the Federal Circuit concluded that their appeal was frivolous. Petitioners do not point to anything they would present at a hearing that they did not argue on appeal. They recognize that the only issue is whether their appeal was frivolous, and they have already had their notice and hearing on that issue.[10]

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[10] *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752 (1980), does not require that assessments against counsel pursuant to court rules be preceded by notice to counsel and an opportunity for a hearing (see Pet. 10). It was only in connection with the exercise of the courts' inherent powers—not pursuant to a court rule, as in the instant case—that this Court found "fair notice and an opportunity for a hearing on the record" to be required prior to an award of attorney fees. 447 U.S. at 767. As stated in the text, the issuance of court rules clearly provides notice that assessments may be made, and the right to be heard on the matter is afforded by the opportunity to submit a brief reciting the merits of one's case. Under such circumstances, it would be ironic indeed to require that the judiciary afford additional opportunities to burden the courts to a lawyer who has already abused the judicial system in the face of rules that prescribe assessments in response to such conduct. See

b. The contention that the court of appeals had no authority to make an asessment against counsel is also without merit. Rule 38 specifically authorizes an award of damages and single or double costs to the appellee in a frivolous appeal. Similarly, 28 U.S.C. 1912 affords a court of appeals the power to award damages and single or double costs to the prevailing party when it has affirmed the judgment below. Neither provision directs that such an award be made only against the losing party or suggests any impediment to an award against the offending counsel. See also 28 U.S.C. 1927 (empowering any court of the United States to assess excess costs, expenses, and attorney fees against "[a]ny attorney * * * who so multiplies the proceedings in any case unreasonably and vexatiously"). The courts of appeals have not

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Miranda v. *Southern Pacific Transportation Co.*, 710 F.2d 516, 525 (9th Cir. 1983) (Wallace, J., concurring in part and dissenting in part). Moreover, the Court in *Roadway Express* had already concluded in the relevant section (447 U.S. at 764-767), that bad faith was required—the determination of which might also benefit from a hearing. This inquiry is unnecessary in this case (see p. 13, *infra*).

Nor did *Miranda* v. *Southern Pacific Transportation Co.*, *supra*, establish a right to formal notice and a hearing under the circumstances of this case. *Miranda* involved a summary imposition of sanctions on attorneys who failed to comply with local rules. As the court of appeals noted, a hearing would have allowed "the attorneys to respond with any arguments they may have had that they had complied with" the local rules. 710 F.2d at 523 n.12. Here, by contrast, petitioners had adequate opportunity to convince the Federal Circuit that their appeal was not frivolous. See also *Malhiot* v. *Southern California Retail Clerks Union*, 735 F.2d 1133 (9th Cir. 1984), cert. denied, No. 84-595 (Jan. 21, 1985); *Nevijel* v. *North Coast Life Ins. Co.*, 651 F.2d 671 (9th Cir. 1981).

hesitated to assess damages and costs against counsel.[11]

c. It is unclear whether petitioners challenge the amount of the award as unjust, or the fact that the court did not explain how the sum was calculated. Regarding the former, it would be absurd to suggest that an award of $500 was excessive. Counsel for the government was required to prepare and file an appellate brief and present oral argument in a case involving five petitioners, and a United States Court of Appeals was required to review the briefs, hear oral argument, and write an opinion.[12] Nor do petitioners give any reason why the court of appeals had to explain how it arrived at the sum; given the modest and clearly reasonable amount, even if there were such a requirement it would be harmless error not to have satisfied it in this case. We note that this Court has not always explained its calculations when making similar awards. See *Hatch* v. *Reliance Ins. Co.*, No. 85-641 (Jan. 13, 1986); *Hyde* v. *Van Wormer*, No. 84-1993 (Nov. 18, 1985).

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[11] See, *e.g.*, *American Security Vanlines, Inc.* v. *Gallagher*, No. 85-5344 (D.C. Cir. Jan. 31, 1986), slip op. 3; *Browning Debenture Holders' Committee* v. *DASA Corp.*, 605 F.2d 35, 40-41 (2d Cir. 1978); *Good Hope Refineries, Inc.* v. *Brashear*, 588 F.2d 846, 848 (1st Cir. 1978). See generally Annot., *What Circumstances Justify Award of Damages and/or Double Costs Against Appellant's Attorney Under 28 USCS § 1912, or Rule 38 of the Federal Rules of Appellate Procedure*, 50 A.L.R. Fed. 652 (1980 & Supp. 1985).

[12] The attorney fees alone in this case clearly exceeded $500. At the rate of $75 per hour, the amount routinely awarded under the Equal Access to Justice Act, the $500 award compensated government counsel for less than seven hours of work —time clearly insufficient to prepare an appellate brief and oral argument.

d. Finally, there is nothing in Rule 38 to suggest that awards are limited to appeals taken in bad faith. Rule 38 requires only that the appeal be "frivolous," and the court of appeals found that this appeal was "clearly frivolous." [13]

With literally thousands of cases before it regarding the air traffic controllers' strike, the Federal Circuit must be able to manage its docket by discouraging frivolous appeals like petitioners'. Its very modest award under Rule 38 was entirely justified.

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[13] In *Roadway Express*, this Court found a requirement that an award of attorney fees be preceded by a finding of "bad faith" or conduct tantamount to it—but, again (see pages 10-11 n.10, *supra*), only in the context of a court exercising its inherent powers. 447 U.S. at 766-767. The Court did not conclude that such a finding is necessary where, as here, a court acts pursuant to a published rule that does not incorporate a bad faith standard (see Pet. 10). This Court has recently imposed sanctions for frivolous petitions—without an explicit finding of bad faith—in *Hatch* v. *Reliance Ins. Co.*, *supra*, and *Hyde* v. *Van Wormer*, *supra*. Nor does the Seventh Circuit require a showing of bad faith in order for an appeal to be frivolous under Rule 38 (see Pet. 10, citing *Freeman* v. *Local Union No. 135*, 746 F.2d 1316 (7th Cir. 1984)). As the court explained in *In re TCI Ltd.*, 769 F.2d 441, 445 (7th Cir. 1985), "[s]ubjective bad faith or malice is important only when the suit is objectively colorable." While as a matter of discretion the Seventh Circuit has considered the presence or absence of bad faith in determining "whether the case is an appropriate one for the imposition of sanctions" under Rule 38—see *Reid* v. *United States*, 715 F.2d 1148, 1154-1155 (7th Cir. 1983)—it has never said that Rule 38 requires such a showing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1986

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 491507 20153